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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JEAN O. TURNER, TRUSTEE,
Cross-Petitioner.

versus

GREGORY J. AVERY AND KATHLEEN R. AVERY,
Cross-Respondents,

On Cross-Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

CROSS-RESPONDENTS' OPPOSITION BRIEF

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QUESTION PRESENTED

Where a debtor-attorney renders legal services both before and after filing a bankruptcy petition to complete the pre-petition contingent fee contracts of a terminated law partnership, what is the estate representative's burden of proof in a turnover action under 11 U.S.C. § 542 to recover that portion of the contingent fees generated by those services rendered pre-petition.

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CROSS-RESPONDENTS' OPPOSITION BRIEF

Gregory J. Avery and Kathleen R. Avery ("Debtors") respectfully submit this brief in opposition to the Cross-Petition for Writ of Certiorari ("Cross-Petition") to the United States Court of Appeals for the Fifth Circuit filed by the Trustee, Jean O. Turner.

STATEMENT OF THE CASE

Effective May 1, 1985, debtor Gregory J. Avery, an attorney, and Ray Orrill mutually terminated their law partnership and began practicing as sole practitioners. On May 22, 1985, Debtors filed a Voluntary Petition for relief under Chapter 7 of the United States Bankruptcy Code. After filing for bankruptcy, Avery handled to completion those former partnership contingent fee cases for which he had primary responsibility.

One and one-half years after the filing date, on January 12, 1987, the Trustee, Jean O. Turner, initiated an adversary proceeding under 11 U.S.C. § 542 against Debtors, contending Debtors' interest in the former partnership's contingent fee contracts constituted assets of the bankruptcy estate. The Trustee sought recovery of all contingent fees earned and received by Debtors after filing their bankruptcy petition. Jurisdiction in the Bankruptcy Court was based on 28 U.S.C. § 1334 and 28 U.S.C. § 157.

After trial on the merits, the Bankruptcy Court rendered an Amended Judgment in favor of the Trustee, holding the estate was entitled to Debtors' right to share in the residuum of the partnership after liquidation and awarding the Trustee $436,486.77, representing all funds the Debtors' received from the former partnership's contingent fee cases. The District Court affirmed in all respects.

Debtors timely appealed to the Fifth Circuit. Applying *In re Tonry*, 724 F.2d 467 (5th Cir. 1984), the Fifth Circuit held the former partnership's contingent fee contracts were executory contracts which, "as a matter of law . . . **did not form a part of the bankruptcy estate.**" *Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991), *petition for cert. filed* No. 91-1159, 1991 Term (filed March 25, 1992) (emphasis added). Nevertheless, the Fifth Circuit held, "Only that portion of the contingent fee contract earned prior to the filing of the bankruptcy petition falls into that estate." *Id.* at 773.[1] After noting this portion "is determinable on a *quantum meruit* basis by measuring the value and worth of the legal services performed both before and after the bankruptcy filing," the Fifth Circuit added the following instructions:

> The matter at bar qualifies as a turnover action. As the representative of the bankruptcy estate in a turnover action the trustee has the burden of proving the partnership interest which, in this case, translates to the trustee's obligation to prove the value of the legal services provided in each case *prior* to the date of the filing of the bankruptcy petition. *See* 11 U.S.C. § 323; *In re Goodson Steel Corp.*, 488

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[1]This holding forms the basis of Debtors' Petition for Writ of Certiorari, No. 91-1159, filed in this Court.

F.2d 776 (5th Cir. 1974); *In re S.E. Hornsby & Sons Sand & Gravel Co.*, 57 B.R. 909 (Bankr. M.D.La. 1986).

Id. at 774. The Fifth Circuit vacated the judgment of the District Court and remanded the matter to the Bankruptcy Court for further proceedings.

REASONS FOR DENYING THE CROSS-PETITION

I. THE INSTRUCTIONS OF THE COURT BELOW ARE CONSISTENT WITH DECISIONS OF THIS COURT.

This Court has addressed an estate representative's burden of proof in a turnover action. *Maggio v. Zeitz*, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed.2d 476 (1948). In the cited case, this Court explained:

> It is evident that the real issue as to turnover orders concerns the burden of proof that will be put on the trustee and how he can meet it. This Court has said that the turnover order must be supported by "clear and convincing evidence," and that includes proof that the property has been abstracted from the bankrupt estate and is in the possession of the party proceeded

against. *It is the burden of the trustee to produce this evidence, however difficult his task may be.*

333 U.S. at 64, 68 S.Ct. at 405 (citations omitted and emphasis added).

This Court's decision in *Maggio v. Zeitz* has settled the question of a Chapter 7 trustee's burden of proof in a turnover action such as the present case to recover that portion of contingent fees earned through pre-petition legal services rendered pursuant to pre-petition contingent fee contracts. As the Fifth Circuit instructed in the case below, the Trustee bears the burden of proving his case by clear and convincing evidence, however difficult this task may be. Because the ruling of the Fifth Circuit in this matter is consistent with this Court's decision settling the issue, the Cross-Petition should be denied.

II. THE INSTRUCTIONS OF THE COURT BELOW ARE CONSISTENT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

Consistent with the Fifth Circuit's instructions in the present case, all Circuit Courts of Appeals that have addressed the allocation of burden of proof in turnover actions have allocated that burden to the estate representative. *In re American Packers Exchange Inc.*, 449

F.2d 1313, 1314 (1st Cir. 1971); *In re Penn Central Transportation Co.*, 477 F.2d 841, 845 (3rd Cir.) *aff'd sub nom. United States Steel Corp. v. Trustees of Penn Central Transportation Co.*, 414 U.S. 885, 94 S.Ct. 231, 38 L.Ed.2d 137 (1973) (admonishing the lower court to require the estate representative to attempt to establish the amounts owing by clear and convincing evidence); *In re Goodson Steel Corp.*, 488 F.2d 776, 779 (5th Cir. 1974); *In re Hayes*, 407 F.2d 1031, 1033 (6th Cir. 1969); *Gorenz v. State of Illinois Department of Agriculture*, 653 F.2d 1179, 1184 (7th Cir. 1981); and *Evans v. Robbins*, 897 F.2d 966, 968 (8th Cir. 1990).

The various Circuit Courts of Appeal which have addressed the question presented are in agreement that the estate representative bears the burden in turnover actions of proving his case by clear and convincing evidence. This uniformity suggests this Court should deny the Cross-Petition.

III. THE INSTRUCTIONS BELOW DO NOT CONFLICT WITH DECISIONS OF THE LOUISIANA SUPREME COURT.

The Trustee argues the Fifth Circuit's instructions allocating the burden of proof in the present matter (and, therefore, the decisions of this Court and every Circuit Court of Appeals which has ruled on this issue) conflict

with *Due v. Due*, 342 So.2d 161 (La. 1977) and *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102 (La. 1979). The Trustee errs, however, because the federal court decisions *allocate the burden* of presenting evidence on the value of a particular asset which allegedly belongs to the estate, while the state court decisions control only the *proper method of calculating* that value. Accordingly, no conflict between these decisions exists.

It is obvious a turnover action under 11 U.S.C. § 542 is a federal cause of action. It would appear equally obvious that one must look to federal law to determine the burden of proof to be applied in such actions. As noted above, this Court and various Circuit Courts of Appeals have settled this issue, placing this burden squarely on the estate representative to establish his case by clear and convincing evidence. In the instant case, this burden "translates to the trustee's obligation to prove the value of the legal services provided in each case *prior* to the date of the filing of the bankruptcy petition." *Turner v. Avery*, 947 F.2d at 774 (emphasis supplied).

The value of Debtors' pre-petition legal services is quantified by reference to state law. *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1402 (9th Cir. 1986) (existence and scope of a debtor's interest in a given asset resolved be reference to state law). Decisions of the Louisiana Supreme Court, then, will provide the *method*

of calculating the value of Debtors' legal services.[2] These state court decisions do not address or control allocation of burden of proof in a turnover action.[3] Accordingly, they do not conflict with those federal court decisions which do address the burden-of-proof issue, and the Cross-Petition should be denied for this reason.

IV. THE INSTRUCTIONS OF THE COURT BELOW ARE NOT RIPE FOR REVIEW BY THIS COURT.

The Trustee seeks review of the Fifth Circuit's instruction regarding the proper allocation of the burden of proof *to be applied on remand*. No court has yet rendered any final judgment in the present case following this instruction. Furthermore, it is quite possible Debtors will prevail on their appeal to this Court or the parties will settle this matter prior to the trial court's rendering any

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[2]It follows these decisions will also control the type of evidence the Trustee must present to carry his burden imposed by federal law.

[3]Neither *Due v. Due*, 342 So.2d 161 (La. 1977) nor *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102 (La. 1979) was a turnover action. *Due* was a suit for rescission of a community property settlement, and *Saucier* was a suit by an attorney to recover that portion of a contingent fee attributable to his services. While these suits might control the allocation of burden of proof in such state actions, neither suit addresses or controls allocation of the burden of proof in a turnover action.

final judgment following the Fifth Circuit's instruction. Thus, a review of the Fifth Circuit's instruction now would be premature. For this additional reason, the Cross-Petition should be denied.

CONCLUSION

The instruction below on the proper allocation of burden of proof on remand does not conflict with prior decisions of this Court, of the Circuit Courts of Appeals, or of the Louisiana Supreme Court. Furthermore, a review of this instruction at this juncture would be premature because no court has yet entered a final judgment based on this instruction. For all these reasons, this Court should deny the Trustee's Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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